## INDEX

Table of Cases, Statutes and Rules Cited ..... ii

Opinion in the Court Below ..... 1

Statement of the Case ..... 2

Argument ..... 6

Conclusion ..... 9

## TABLE OF CASES, STATUTES AND RULES CITED

State v. Moretti, 244 A.2d 499 (N.J. 1968) ..... 8

United States v. National Dairy Products Corp., 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 ..... 7

United States v. Vuitch (Nos. 1043-68, 1044-68 1587-69, D.C.Cir. Nov. 10, 1969) ..... 8

Section 559.100, RSMo 1959 ..... 6

Supreme Court Rule 19 ..... 8



BLEED THROUGH POOR COPY

IN THE

# SUPREME COURT OF THE UNITED STATES

---

OCTOBER TERM, 1969

---

NO. _____

---

RICHARD P. MUCIE, D.O.,
*Petitioner,*

vs.

STATE OF MISSOURI,
*Respondent.*

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

---

The State of Missouri, through its Attorney General, presents the following brief in opposition to the Application for Writ of Certiorari to the Supreme Court of Missouri filed by the petitioner.

## OPINION IN THE COURT BELOW

1. Petitioner was tried and convicted in the Circuit Court of Jackson County, Missouri, before the Honorable Paul E. Vardeman. This decision is not reported.

2. The above case was appealed to the Supreme Court of Missouri. The Division One opinion was filed January 12, 1970, and reported as State v. Mucie, 448 S.W.2d 879.

## STATEMENT OF THE CASE

As no appendix comprising the transcript on appeal is, as yet, available, no page references to a transcript or appendix can be made.

In late November, 1967, Nancy Ward, a nineteen year old co-ed at Oklahoma University, discovered she was pregnant. With the help of her fiance, Fred Landreth, and his father, they located the petitioner, an osteopath in Kansas City, Missouri. On January 30 Landreth's father contacted petitioner and informed him that his son and his fiancee had "a problem." The petitioner advised the boy's father to have the girl examined in Oklahoma to determine the duration of her pregnancy. This was done and it was determined that she was in the early second trimester. The petitioner advised Landreth's father to have the girl come to his office on February 7, 1968. A brief discussion ensued about the cost of the abortion.

On February 7, 1968, Nancy Ward and Fred Landreth flew to Kansas City arriving in the early evening, and they went directly to the "Kansas City Sinus Clinic", petitioner's place of business. Nancy Ward was taken into the inner office where she remained with the petitioner for about fifteen minutes. Petitioner then advised them that he had made an arrangement for them to stay at the Ambassador Hotel in Kansas City. He took the couple to the hotel and advised them that he would contact them about 11:30 p.m.

At approximately 11:00 p.m. petitioner called and indicated that he would pick them up in about forty minutes. He did so and drove the couple back to his office.

BLEED THROUGH POOR COPY

Upon arriving at the office the petitioner took the girl into the inneroffice and emerged in about twenty or thirty minutes wearing a surgeon's gown. He asked Landreth if he would like to pay him before he started. Landreth produced four $100 bills and the petitioner disappeared into the back room only to emerge occasionally to change phonograph records which were continually played. Landreth remained in the waiting room throughout the night until about 7:30 a.m. on the morning of February 8.

At about 7:30 a.m. the petitioner emerged and asked Landreth if he wished to see the girl. Landreth accompanied petitioner into the inneroffice where Nancy Ward was lying on a couch under a cover. The petitioner indicated that she was under sedation. While Landreth tried to communicate with her, she was unresponsive and he returned to the waiting room and slept until around 11:30 a.m.

At approximately 11:30 a.m. Landreth was awakened and was informed by Dr. Mucie that Nancy Ward had suffered a heart attack and had to be taken to the hospital. The petitioner then returned to the back room and after about a half hour Landreth went looking for him. He overheard the petitioner stating something to the effect that "was it necessary for a coroner to be called in, couldn't he just complete a doctor's Certificate of Death?" Petitioner then emerged and told Landreth that Nancy Ward had died. Petitioner then stated that the only possible way they could get out of this was to fabricate a story about the couple passing through Kansas City and her being treated for chest pains.

Charles Sievers, an ambulance driver, was dispatched to the Kansas City Sinus Clinic around 11:30 a.m. on February 8, 1968. There they were shown by the petitioner to a girl lying on a doctor's cot. The petitioner advised the ambulance driver that he detected a heart beat and instructed Sievers to take the girl to Osteopathic Hospital. Sievers noted blood on the girls fingers and a stiffness of the arms.

He observed that Nancy Ward's hands were in a clawed position. The patient's legs would not bend, and he was unable to detect a pulse or heart beat.

Upon arrival at Osteopathic Hospital the girl was examined by Dr. Richard Spavins and Dr. Andrew McCanse. Dr. Spavins examined the body around 1:00 p.m. and concluded that Nancy Ward had been dead about four hours. When he called the petitioner, he was told that he had given the girl cardiac resuscitation and an injection of vistaril, a tranquilizer and that the petitioner had been treating her for about two weeks for a heart condition. Dr. McCanse observed the body about 2:30 p.m. and ordered an autopsy. McCanse also called the petitioner and was also told about treating her for a cardiac condition.

Dr. Raymond Caffrey, a pathologist, performed an autopsy upon the body. He noted needle punctures in the girl's arms, buttocks and side. He noted a pink staining material resembling Merthiolate on the perineum space between the legs and that the breasts were unusually tense and nipples heavily pigmented, indicative of pregnancy. The uterus was found to be substantially enlarged and softened and manifested characteristics common to pregnancy. There was a rent or tear in the uterus about one-half inch in length. There was approximately 1200 cc's (slightly more than a quart) of blood in the abdominal cavity and there were two or three ounces of blood inside the uterus. The only identifiable source of bleeding was the rent in the uterus. A scull and upper half of a fetus was still in the uterus. There was substantial hemorrhage between the lining of the heart in the wall of the left ventricle indicative of the type of change which is seen in the heart structure of a person who is dying a slow, painful death usually over a span of hours. Caffrey testified that this phenomenon was fairly common in persons who die slowly and in shock. He concluded that the

BLEED THROUGH POOR COPY

cause of death was by bleeding to death through the hole in the uterus.

The petitioner's defense was that Nancy Ward had attempted to abort herself, or that in any rate, an incomplete abortion had begun at the time he first saw her. He described the surgical steps which he took to clean up the abortion and remove the partially aborted fetus. He further testified that at approximately dawn she became hard to arouse and he instituted emergency procedures. His defense in a nutshell was that he was attempting to rectify an abortion which had been performed by someone other than himself.

The jury did not respond to the defense and found the petitioner guilty of manslaughter by abortion. His sentence was set at 10 years in the Missouri Department of Correction.

## ARGUMENT

**The Supreme Court of the United States should not grant certiorari to the petitioner because:**

### I.

**The points which the appellant raises on appeal did not form the basis of his defense in the trial, and do not represent the theory upon which he tried his case. His reliance upon the claims of unconstitutionality, while raised only in a cursory manner at the trial level, did not blossom until his appeal and we suggest that these facts are not those upon which he may properly argue those issues involving the constitutionality of the Missouri Abortion Statute.**

As was noted by the Supreme Court of Missouri, the case against Dr. Mucie was made upon an affirmative showing that the victim desired and sought an abortion to rid herself of an unwanted child and that Dr. Mucie performed the abortion for that purpose. His defense, however, was based upon the premise that Nancy Ward came to him in an already, or incompletely aborted state, and that petitioner's actions were not designed to produce an abortion but were to remedy a partially accomplished abortion. In short, his defense was that someone else had aborted the fetus, and he was simply "cleaning up a botched job." Thus, his testimony did not go to a defense based upon the exception included in the Missouri abortion statute (Section 559.100, RSMo 1959) "unless the same is necessary to preserve her life",[1] but went, rather to a defense (unbelieved by the jury) that petitioner did not do it; someone else did it.

---

[1] The Missouri abortion statute reads as follows:

"Any person who, with intent to produce or promote a miscarriage or abortion, advises, gives, sells or administers to a woman (whether actually pregnant or not), or who, with such intent, procures or causes her to take any drug, medicine or article, or uses upon her,

In short, the petitioner has jumped upon a bandwagon which he did not ride in the early stages of this litigation. His defense was to the effect that he did perform certain medical procedures upon the deceased, but these were not in the nature of an abortion. He claims they were only recuperative in nature, and his failure to offer evidence designed to bring him within the exception ("unless the same is necessary to preserve her life") presents no record upon which to predicate a determination of the constitutionality of that provision of the Missouri abortion statute.

We suggest the application of the reasoning adopted in United States v. National Dairy Products Corp., 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561:

> "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed (citing cases). In determining the deficiency of the notice, a statute must of necessity be examined in the light of the conduct with which a defendant is charged."

---

or advises to or for her the use of, any instrument or other method or device to produce a miscarriage or abortion (unless the same is necessary to preserve her life or that of an unborn child, or if such person is not a duly licensed physician, unless the said act has been advised by a duly licensed physician to be necessary for such a purpose), shall, in event of the death of said woman, or any quick child, whereof she may be pregnant, being thereby occasioned, upon conviction be adjudged guilty of manslaughter, and punished accordingly; and in case no such death ensue such person shall be guilty of the felony of abortion, and upon conviction be punished by imprisonment in the penitentiary not less than three years nor more than five years, or by imprisonment in jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment; and any practitioner of medicine or surgery, upon conviction of any such offense, as is above defined, shall be subject to have his license or authority to practice his profession as physician or surgeon in the state of Missouri revoked by the state board of medical examiners in its discretion."

We suggest that the petitioner is now attempting to hide under the umbrella of a portion of the statute from which he never sought protection, and which had, by his own theory of defense, no application to his conduct.

Using the National Dairy Products case as a spring board the Supreme Court of New Jersey in State v. Moretti, 244 A.2d 499 (N.J. 1968), refused to adjudicate the unconstitutionality of a similar abortion statute where the appellant did not base his defense on the activities proscribed by the statute.

Petitioner cites United States v. Vuitch (Nos. 1043-68, 1044-68, 1587-69, D.C.Cir. Nov. 10, 1969). We would point out that the court was dealing with a statute of the District of Columbia which contained the following exception:

> "... necessary for the preservation of the mother's life or health ..."

The court commented that the word "health" is not defined and in fact remains so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health. Upon that premise the District of Columbia Court of Appeals found the statute unnecessarily vague. We submit that there is a vast difference between the statute in Vuitch and Section 559.100, RSMo 1959, in that the addition of the word "health" is not found in the Missouri statute and thus the fatal ambiguity of Vuitch is not present here.

Finally, we suggest that the considerations contained in Supreme Court Rule 19 do not present this case as one meriting certiorari. There are no conflicting Court of Appeals decisions. To our knowledge the only Court of Appeals decision to consider the constitutionality of a similar abortion statute is Vuitch, supra. While the questions presented may have some substance, there is no indication that a division has or will result bewteen the circuits.

## CONCLUSION

Wherefore, the respondent prays that this court deny the petitioner's Application for Writ of Certiorari to the Supreme Court of Missouri.

Respectfully submitted,

JOHN C. DANFORTH
Attorney General of Missouri

DALE L. ROLLINGS
Ass't. Attorney General of Missouri
Supreme Court Building
Jefferson City, Missouri 65101
*Attorneys for Respondent*